

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion into Competition for  
Local Exchange Service.

Rulemaking 95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the  
Commission's Own Motion into Competition for  
Local Exchange Service.

Investigation 95-04-044  
(Filed April 26, 1995)

**ADMINISTRATIVE LAW JUDGE'S RULING  
GRANTING MOTION OF PAC-WEST TELECOMM, INC.**

**1. Summary**

Pac-West Telecomm, Inc. (Pac-West) moves for an Administrative Law Judge (ALJ) ruling prohibiting Verizon California Inc. (Verizon) from unilaterally implementing new rates established by the Federal Communications Commission (FCC) for delivery of Internet-bound telephone traffic. The ALJ ruling is sought under the Dispute Resolution Procedure set forth in the interconnection agreement between Pac-West and Verizon, and the ruling is subject to appeal to the Commission through filing of a formal complaint. For the reasons set forth below, this ruling finds that Pac-West's motion should be granted and Verizon should be prohibited from implementing the new FCC rates in the absence of an amendment to its interconnection agreement with Pac-West.

## 2. The FCC Order

On April 27, 2001, the FCC released its *Order on Remand*<sup>1</sup> establishing a new rate regime for Internet service provider (ISP) traffic. The order was published in the Federal Register on May 15, 2001, and became effective on June 14, 2001. The FCC declared that ISP-bound traffic constitutes “information access” and thus is not subject to the reciprocal compensation requirement of Section 251(b)(5) of the Telecommunications Act of 1996. The FCC concluded that it has the authority under Section 201 of the Act to regulate ISP-bound calls and to establish inter-carrier compensation rules for such calls.

Under the FCC plan, reciprocal compensation rates for ISP-bound traffic are subject to declining rate caps over a 36-month period. Traffic exceeding a three-to-one ratio of terminating to originating traffic is presumed, unless proven otherwise, to be ISP-bound traffic subject to the FCC’s rate structure. After the 36-month period, bill-and-keep compensation would apply to such traffic instead of reciprocal compensation.

While the new rate regime went into effect on June 14, 2001, for carriers entering into new or renegotiated interconnection agreements, the FCC envisioned prospective application of the new rates for existing interconnection agreements. The FCC stated:

“The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for

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<sup>1</sup> *Order on Remand and Report and Order*, CC Docket No. 96-98 and CC Docket No. 99-68 (released April 27, 2001).

ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.”<sup>2</sup>

### **3. Verizon’s Implementation of the FCC Order**

By letter dated May 14, 2001, Verizon advised Pac-West that the FCC order constitutes a material change of law and that, effective June 14, 2001, Verizon “will not pay any amounts invoiced by [Pac-West] that exceed the applicable rate caps or payment limits” prescribed in the FCC order. Verizon argues that the FCC plan is “self-effect[uat]ing by operation of the provisions of Pac-West’s interconnection agreement, including its change-of-law provisions.”<sup>3</sup>

What Verizon regards as the change-of-law provision in its interconnection agreement with Pac-West is set forth in the preamble of the agreement and states:

“This Agreement shall at all times be subject to such changes or modifications by the California Public Utilities Commission (CPUC or Commission) or Federal Communication[s] Commission as either may, from time to time, direct [in] the exercise of its jurisdiction. If any such modifications renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon any necessary amendments to the Agreement.”<sup>4</sup>

Pac-West argues that the preamble clause in its interconnection agreement is not a change-in-law provision but merely a statement that the agreement is subject to the jurisdiction of the FCC and the Commission. Even were it

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<sup>2</sup> *Order on Remand*, ¶ 82.

<sup>3</sup> *Response to Pac-West Motion*, Rulemaking 00-02-005 (June 27, 2001).

<sup>4</sup> *Telecommunication Facility Interconnection Agreement*, dated as of June 21, 1996.

regarded as a change-of-law provision, Pac-West asserts, the FCC did not “direct” a change in existing interconnection agreements. Instead, according to Pac-West, the FCC stated that its order “does not alter existing contractual obligations” and would apply “as carriers renegotiate expired or expiring interconnection agreements.”

#### **4. Pac-West’s Filing for Dispute Resolution**

Pac-West, Verizon and other parties have filed comments on the FCC’s order in the rulemaking proceeding looking into this Commission’s policy of requiring reciprocal compensation for ISP-bound traffic. (Rulemaking 00-02-005.) In addition, in the local competition docket, Pac-West on August 3, 2001, filed this motion for dispute resolution under Article 13 of its interconnection agreement with Verizon. Article 13, in turn, invokes the Dispute Resolution Procedure adopted by the Commission in 1995 in Decision (D.) 95-12-056. The parties believe that this is the first time that the Dispute Resolution Procedure has been utilized.

Under the procedure, in the event of a dispute over terms of an interconnection agreement, the parties are required to try to resolve the matter informally at an executive level. If that fails, a party may file a motion seeking mediation before an ALJ. If mediation fails, an ALJ then directs the parties to file pleadings and rules on the dispute. If either party disagrees with that ruling, the party may contest the ruling by filing a formal complaint with the Commission. (See D.95-12-056, Ordering Paragraph 11; 63 CPUC2d 700, 749-50.)

In this proceeding, a prehearing conference was conducted on September 12, 2001. Mediation was waived, and the parties asked the ALJ to rule on the dispute based on the pleadings. Brief summaries of the positions of the parties were filed on September 21, 2001.

## 5. Discussion

The FCC order is not self-executing for existing interconnection agreements. Instead, the FCC provides that its interim compensation regime will apply prospectively as carriers renegotiate such agreements. The interconnection agreement at issue here is renewable annually on June 19. Under Article 9.02, either party may terminate the interconnection agreement on June 19 after 60 days' prior written notice. If notice of termination is given, the other party may request negotiation of a new interconnection agreement. Therefore, by the express terms of the agreement, Verizon is not free on its own to amend the terms of its agreement with Pac-West until notice of cancellation and renegotiation.

The FCC order goes on to provide that a party may change the terms of an existing agreement if permitted to do so by a change-of-law provision. Change-of-law provisions typically provide that an agreement shall be deemed to have been amended automatically if the law changes.<sup>5</sup> The preamble language suggests a statement of jurisdiction more than it does a change of law. Indeed, as Pac-West notes, nothing would change if the preamble paragraph were deleted, since the FCC and the Commission would still possess their respective powers and still would be able to direct the carriers involved to modify their agreement.

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<sup>5</sup> See, e.g., the Interconnection Agreement of GTE California and USA Digital, filed as an advice letter on July 12, 2000 ("The Parties agree that if the Arbitrated Rates or any subsequent permanent rates or charges are deemed to be unlawful or otherwise modified pursuant to such an order or decision...then this Agreement shall be deemed to have been automatically amended...and such amendments shall be effective upon the date of the applicable Order.")

More importantly, however, the preamble paragraph looks to a change or modification of the interconnection agreement when the FCC directs it. As to the existing agreement between Verizon and Pac-West, the FCC's "direction" is to make the change in ISP-bound rates when the two carriers renegotiate their agreement.

Verizon argues that the preamble paragraph provides that the agreement shall "at all times" be subject to changes in law fashioned by the FCC. But the question is not *whether* the agreement here is subject to the FCC rates – clearly, it is. The question is *when* will this interconnection agreement be subject to those rates. The answer, again, in the words of the FCC, is at the time that "carriers renegotiate expired or expiring interconnection agreements."

Accordingly, pursuant to the Dispute Resolution Process invoked by Pac-West, **IT IS RULED** that:

1. Verizon California Inc. (Verizon) is not entitled without agreement by Pac-West Telecomm, Inc. (Pac-West) or appropriate order by this Commission or by the Federal Communications Commission (FCC) to apply the FCC rate caps to ISP-bound traffic in lieu of the reciprocal compensation rates specified under Section 8.01(2) of the interconnection agreement.

2. Verizon is directed to pay in full the reciprocal compensation charges specified under Section 8.01(2) of the interconnection agreement for all ISP-bound traffic for as long as the interconnection agreement is in effect and is not modified by written amendment or by appropriate direction of the FCC or this Commission.

3. Verizon is directed to pay Pac-West all amounts it has withheld from Pac-West based upon its position that it has implemented the FCC Order as

required by the interconnection agreement, together with interest thereon at the three-month commercial paper rate.

4. Pursuant to the Dispute Resolution Procedure, either party may challenge this Administrative Law Ruling by filing a formal complaint with the Commission.

Dated September 27, 2001, at San Francisco, California.

/s/ GLEN WALKER

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Glen Walker  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion of Pac-West Telecomm, Inc. on all parties of record in this proceeding or their attorneys of record.

Dated September 27, 2001, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.